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No. 84-922

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

LINEAS AEREAS COSTARRICENSES, S.A., *et al.*,
Appellants,

v.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,
Appellee.

On Appeal from the Supreme Court of the State of Florida

APPELLANTS' REPLY BRIEF

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In accordance with Supreme Court Rule 16.5, Lineas Aereas Costarricenses, S.A. and the other foreign airline appellants in this proceeding[1] ("Foreign Airline Appellants") submit this reply brief in opposition to the motion of the State of Florida to dismiss this appeal or to affirm summarily the judgment of the court below. The Florida Airline Appellants will address only two points made by the State of Florida: (1) that the Florida tax

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[1] The complete names of all of the Foreign Airline Appellants, and their parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates, were provided in Appendix I to the Jurisdictional Statement.

is no more than a tax on a purely local transaction that does not affect foreign commerce; and (2) that the Florida tax does not prevent the Federal Government from speaking with one voice in its international economic relations.

In its motion, the State of Florida contends that the fuel tax at issue in this case is a purely intrastate matter because it purportedly is imposed upon the withdrawal of fuel from storage within the State of Florida. Accordingly, Florida suggests that the state fuel tax does not have international implications.

Nothing could be farther from the truth. While this case has been pending before this Court, twenty three nations have submitted diplomatic notes to the United States Department of State protesting the Florida fuel tax.[2] The twenty three protesting nations include most of the major aviation trading partners of the United States in virtually every region of the world.

The diplomatic notes unanimously express the serious concern of foreign governments about the Florida tax and the prospect that the uniform international practice of providing reciprocal exemption from tax at all levels of government to international aviation fuel will be eroded if the Florida tax is allowed to stand. For example, the note submitted by the Embassy of Ecuador states:

> The Embassy of Ecuador wishes to inform the Department of State of the grave concern of the Government of Ecuador concerning the imposition of this tax on international air carriers such as Ecua-

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[2] Diplomatic notes have been submitted by Argentina, Belgium, Brazil, Chile, Colombia, Costa Rica, Ecuador, France, Germany, Honduras, Iceland, Israel, Italy, Japan, Mexico, The Netherlands, Norway (on behalf of itself, Denmark, and Sweden), Spain, Switzerland, Trinidad and Tobago, and the United Kingdom. Counsel to the Foreign Airline Appellants is prepared to lodge copies of all these notes with the Court.

> toriana. It is inappropriate for local jurisdictions such as the State of Florida to impose taxes on fuel used by international air carriers. Under the established practice of nations such fuel purchases are exempt from tax. Consistent with this practice, Ecuador does not impose taxes at the national or local level on fuel used by international air carriers. The Florida tax is inconsistent with this international standard of reciprocity.

Diplomatic Note submitted by the Embassy of Ecuador to the U.S. Department of State (Dec. 14, 1984).

These strong expressions of concern by such a large number of foreign nations confirm that the Florida tax implicates foreign policy issues that must be left to the Federal Government.

In their Jurisdictional Statement, the Foreign Airline Appellants also showed that uniformity in the conduct of the commercial relations of the United States would be impaired if the Florida fuel tax is allowed to stand, and that the Federal Government would be prevented from speaking with one voice in its diplomatic relations. Such a result would be directly contrary to the requirements established by the Court in *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434 (1979). The State of Florida challenges this position, arguing that some of the agreements between the United States and foreign countries regarding aviation do not expressly forbid state fuel taxes and that these agreements are the exclusive expression of the policy of the United States on this issue.

This argument ignores numerous policy expressions of the United States specified in the Jurisdictional Statement. It also ignores the fact that many foreign governments regard the Florida tax as inconsistent with established United States policy. As the Embassy of Iceland pointed out:

> Local taxation of international commerce is inconsistent with, and violates the reciprocity intended by our Agreements and Treaties. Local taxation prevents the Government of the United States from uniformly conducting its relationships with foreign governments. This lack of continuity undermines those relationships.

Diplomatic Note submitted by the Embassy of Iceland to the U.S. Department of State (Dec. 18, 1984).

In their Jurisdictional Statement, the Foreign Airline Appellants also demonstrated the existence of an international consensus, to which the United States subscribes, favoring reciprocal exemption from taxation at all levels of government for international airline fuel. The diplomatic notes confirm this established international practice. As the Embassy of Colombia points out:

> . . . it is totally inappropriate for local jurisdictions to impose taxes upon fuel intended for use by international airlines. For many years there has been an established practice among nations of exempting fuel purchased by international airlines from tax. This practice is demonstrated in Article 24 of the Convention on International Civil Aviation and resolutions on this subject adopted by the Council of the International Civil Aviation Organization on November 14, 1966. This policy has played an important role in the healthy growth of international aviation by preventing an inappropriate financial burden on airlines and their customers.

Diplomatic Note submitted by the Embassy of Colombia to the U.S. Department of State (Dec. 7, 1984).

The diplomatic notes observe that the Florida fuel tax violates this practice and creates the distinct possibility of retaliatory taxation of international airline fuel. Many of the diplomatic notes specifically state that exemptions are granted to United States carriers by foreign nations

with the expectation that reciprocal exemptions will be granted in the United States. Other notes indicate the actions foreign governments are likely to consider taking if the Florida tax is upheld. For example, the Embassy of Colombia states that:

> . . . the example of Florida could set a precedent to be followed by other governments. If the United States allows its states to impose taxes upon fuel purchased by international airlines, the airlines of the United States could very soon see the initiation of local or national taxes by other nations. The development of such a pattern would surely be detrimental to the interests of all concerned and harmful to the development of aviation.

Id.

In a similar vein, the Government of the Republic of Trinidad and Tobago states that it:

> . . . believes that true reciprocity on the part of the United States requires air carrier tax exemptions at both the federal and local levels. The failure of the United States to ensure such complete exemptions may be considered a failure of reciprocity under applicable bilateral agreements, and could moreover constitute a precedent for similar action by other foreign governments.

Diplomatic Note submitted by the Embassy of Trinidad and Tobago to the U.S. Department of State (Dec. 10, 1984).

These diplomatic communications make it clear that there is a genuine danger of retaliatory taxation against United States aviation if the states are allowed to impose taxes on aviation fuel used by international airlines. The Foreign Airline Appellants submit that the expressions of concern and opposition to the Florida tax submitted by twenty-three foreign nations are the clearest possible indication that Florida has intruded where federal uniformity is essential if the Federal Government is to be able effectively to conduct the foreign relations of the

United States in the delicate area of international aviation.

In short, the arguments of the State of Florida that the Florida fuel tax is simply an excise on a domestic transaction which does not affect foreign commerce, and that the Florida fuel tax does not impair the ability of the United States to speak with one voice in its foreign relations are without merit. The Foreign Airline Appellants submit that this tax does have serious practical effects on foreign commerce. Additionally, this tax impairs the ability of the Federal Government to conduct the foreign relations of the United States and creates a serious risk of injury to this country's international aviation relationships. This is precisely the type of danger which the Commerce Clause, as interpreted by this Court in *Japan Line*, was intended to prevent.

The motion of the State of Florida should be denied, and probable jurisdiction should be noted.

Respectfully submitted,

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